INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Summary statement of the matter involved	1
Jurisdictional statement	5
Question presented	5
Reasons relied on for allowance of writ	6
Prayer for writ	6
Brief in support of petition	7
Opinions of courts below	7
Jurisdiction	8
Statement of the case	8
Specification of errors	8
The argument	8
Summary of the argument	8
Point A	9
Point B	16
Conclusion	25
Appendix	27

Table of Cases Cited

Aetna Casualty etc., Co. v. *Gentry*, 132 Pac. (2d) 326	13
Central Railroad and Banking Co. v. *Carr*, 76 Ala. 388	17
Cowikee Mills v. *Alabama-Georgia Power Co.*, 216 Ala. 221, 113 So. 4	24, 25
Dunn v. *Cedar Rapids Co.*, 152 F. (2d) 733	18
Jefferson Island Salt Co. v. *Longyear Co.*, 210 Ala. 352, 98 So. 119	18
International Shoe Co. v. *Washington*, 326 U. S. 310	16
Lee v. *Baird*, 139 Ala. 526	17
McKnett v. *St. Louis and San Francisco R. R. Co.*, 292 U. S. 230, 54 Sup. Ct. 690, 78 L. Ed. 1227	18
National Council, etc., v. *Hill*, 208 Ala. 63, 93 So. 812	17

Page

Neirbo Co. v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165 ..... 5, 6
New York Railroad Co. v. *Estill*, 147 U. S. 591, 13 S. C. 444, 37 L. Ed. 292 19
Old Wayne Life Association v. *McDonough*, 204 U. S. 8, 27 S. C. 236, 51 L. Ed. 345 19
Parker v. *Central of Georgia R. R. Co.*, 233 Ala. 149, 17 So. 333 ..... 5, 23
Pennoyer v. *Neff*, 95 U. S. 714 26
Simon v. *Southern R. R. Co.*, 236 U. S. 115, 35 S. C. 255, 59 L. Ed. 492 19
Smith v. *Gibson*, 83 Ala. 284 17
Smolik v. *Philadelphia and Reading Coal and Iron Co.*, 222 Fed. 148 22
Steen v. *Swadley*, 126 Ala. 616 17

STATUTES CITED

Act of July 6, 1940 (General Acts of Alabama 1939, p. 976, approved July 6, 1940) 12
Act of 1907, Section 97, Title 7 of Code of Alabama of 1940) 16
Code of Alabama of 1940, Section 192, Title 10 ..... 11, 25
Code of Alabama of 1923:
Section 7209 11
Section 9426 12
28 U. S. C. 347 (Judicial Code, Sec. 240 as amended) 5

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1025

MRS. MARION T. SMITH, WHO SUES AS ADMINISTRATRIX OF THE ESTATE OF HER DAUGHTER, HELEN WALKER LaFEVER,

Petitioner and Appellant Below,

vs.

HYDRO GAS COMPANY OF WEST FLORIDA, INC., A CORPORATION, QUINN W. STUART, MARION W. BAGWELL, BETTY S. GOLDSMITH AND MYRTLE BAGWELL, INDIVIDUALLY, AND DOING BUSINESS AS A PARTNERSHIP UNDER THE NAME AND STYLE OF GENERAL STEEL TANK COMPANY, AND GENERAL STEEL TANK COMPANY, AN ORGANIZATION WHOSE TRUE LEGAL ENTITY IS OTHERWISE UNKNOWN TO THE PLAINTIFF, ETC.,

Respondents and Appellees Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

Summary Statement of the Matter Involved

This is an action at law brought in the District Court of the United States for the Southern District of Alabama by

your petitioner seeking damages for her daughter's death. The suit was dismissed by the District Judge for lack of jurisdiction (R. 39). An appeal was taken to the Circuit Court of Appeals for the Fifth Circuit. It affirmed the judgment of the District Court.

Your petitioner's daughter Helen was burned to death in a Butane gas explosion at Pensacola, Florida, at about three o'clock A. M. on September 11, 1945 (R. 4). As administratrix of her estate, your petitioner sued the Hydro Gas Company of West Florida, Inc. (hereafter called the Gas Company), and a partnership known as General Steel Tank Company (hereafter called the Tank Company), and certain individuals comprising that partnership. The Tank Company had manufactured the tank from which the gas escaped and had delivered it to the Gas Company a week or ten days before the event. The Gas Company had installed the tank on the late afternoon preceding the night of the death of plaintiff's intestate.

The plaintiff is a resident of Pennsylvania. Her daughter, Helen, the deceased, was at the time of her death in the naval service of the United States, Stationed at Pensacola, Florida. The Gas Company is a corporation duly organized and existing under the laws of Florida. The Tank Company has its principal office and plant in Birmingham, Alabama, where certain of its constituent partners reside (R. 2).

As appears from the Certificate of the Secretary of State of the State of Alabama, the Gas Company qualified in Alabama as a foreign corporation for the transaction of business on December 16, 1937 (R. 34), and designated as statutory agent one Beatty, whose address was given as Brewton, Alabama (within the judicial district of the District Court below). There had been no revocation of this relationship of the Gas Company with Alabama (R. 34).

When service of process was attempted on the Gas Company, the Marshal made return of "not executed". Beatty, he reported, is "no longer a resident of this district. He is said to have left Brewton, Ala., for Florida, about 18 months ago" (R. 9). Service of process on the Gas Company was then effected by serving a copy of the summons and complaint on the Secretary of State of the State of Alabama (R. 11).

As to the other respondents, the return of the United States Marshal for the Northern District of Alabama (R. p. 10), recites that process was served on "Marion W. Bagwell personally" and on "Marion W. Bagwell as partner and general manager of General Steel Tank Company", as well as on Myrtle Bagwell (R. 10).

The Tank Company and the individual respondents seasonably appeared and moved the District Court to dismiss the action. They said that it was not filed in the proper district because your petitioner was not a resident of Alabama, and they were all residents of the Northern District of the State, residing in Birmingham (R. 12).

The appearance of the Gas Company, seasonably made, was in the form of a Motion to Dismiss (R. p. 14 et seq.). It said that it was not there subject to suit and denied that it had been properly served with process. It charged, as further grounds to dismiss, that none of the parties resided in the District where the action was brought and that it, in particular, was not there subject to service of process. It said that to hold it there suable would invade its constitutional rights (R. 14).

With its Motion to Dismiss, the Gas Company filed affidavits that while it had qualified in Alabama and appointed a statutory agent in the person of one Beatty, it had not done business in the State for several years, and Beatty was no longer in its employ (R. 19 et seq.).

To these special appearances your petitioner filed Motions to Strike and a Reply. She said that the fact, if it be a fact, that the Gas Company had ceased to do business in Alabama, and that Beatty was no longer its agent, or within the state, was immaterial because it had, without dispute, qualified itself within the state and had appointed a statutory agent and consented to be sued in Alabama, and that such acts, as were conceded by the Gas Company and affirmatively established by the certificate of the Secretary of State of the State of Alabama, had never been rescinded or revoked; that as a consequence said Gas Company was in fact present in Alabama and amenable to suit in the judicial district where it had formerly transacted business and where its former agent had resided and where it had consented to be sued (R. 27 et seq.).

In respect of the Tank Company and the individual respondents, it is conceded that if the Gas Company is not suable in the District Court below, neither are they. On the other hand, if the Gas Company is there amenable to suit, so are the Tank Company and the individual respondents.

On these pleadings the cause was argued in the District Court below. It decreed that the Gas Company was not there suable in that it was not doing business in the State of Alabama, nor had it an agent upon whom service of process might be had nor had it "been found in or consented to be sued in said state, or been a resident citizen or inhabitant of said state" (R. 39). The service on the Gas Company was quashed, and as to it the action dismissed. As a consequence, it was also dismissed as to the other respondents.

The Circuit Court of Appeals affirmed the judgment of the District Court. It said that the Gas Company, in qualifying to do business in Alabama and appointing a statutory agent—neither of which acts it was conceded having ever

been formally revoked—did not, in the absence of doing business in Alabama at the time of the suit's commencement, amount to a consent to be there sued on a cause of action arising outside the state.

Jurisdictional Statement

It is contended that the Supreme Court has jurisdiction to review the judgment here in question because:

(a) It has decided a Federal question in a way probably in conflict with an applicable decision of this Court, (*Neirbo Co.* v. *Bethlehem Shipbuilding Corp.*, 308 U. S. 165), and

(b) It has decided an important question of local law probably in conflict with applicable local decisions, (*Parker* v. *Central of Georgia R. R. Co.*, 233 Ala. 149, 17 So. 333, 1936.

The statutory authority under which such jurisdiction is invoked is 28 U. S. C. 347 (Judicial Code, Section 240, amended).

The date of the judgment to be reviewed is November 14, 1946.

Question Presented

The sole question here presented is as follows:

Where a foreign corporation has duly qualified in a particular state, can it be sued there on a cause of action arising elsewhere after it has ceased to do business in the state but never formally retried from the jurisdiction?

Does the rule of the *Neirbo* case establish a consent to be sued under these circumstances?

Reasons Relied On for Allowance of Writ

1. The Court below has decided a Federal question in a way probably in conflict with *Neirbo Co.* v. *Bethlehem Shipbuilding Corporation*, 308 U. S. 165

2. It has likewise decided an important question of local law probably in conflict with applicable local decisions.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket No. 11660, *Mrs. Marion T. Smith, etc.*, Appellant v. *Hydro Gas Company, etc., et al.*, Appellees, to the end that this case may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by this Court and for such further relief as to this Court may seem proper.

Mrs. Marion T. Smith, as Administratrix of the Estate of Helen Walker LaFever, Deceased. Petitioner.

J. Kirkman Jackson,
818 Massey Building,
Birmingham, Alabama,
Her Attorney.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1025

MRS. MARION T. SMITH, WHO SUES AS ADMINISTRATRIX OF THE ESTATE OF HER DAUGHTER, HELEN WALKER LaFEVER,

Petitioner and Appellant Below,

vs.

HYDRO GAS COMPANY OF WEST FLORIDA, INC., A CORPORATION, QUINN W. STUART, MARION W. BAGWELL, BETTY S. GOLDSMITH AND MYRTLE BAGWELL, INDIVIDUALLY, AND DOING BUSINESS AS A PARTNERSHIP UNDER THE NAME AND STYLE OF GENERAL STEEL TANK COMPANY, AND GENERAL STEEL TANK COMPANY, AN ORGANIZATION WHOSE TRUE LEGAL ENTITY IS OTHERWISE UNKNOWN TO THE PLAINTIFF, ETC.,

Respondents and Appellees Below

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

Opinions of Courts Below

The opinion of the Circuit Court (R. 47) is reported in 157 F. (2d) 809. The judgment of the District Court (R. 38) was without opinion.

Jurisdiction

This has already been set forth in the preceding petition and is here adopted and made a part of this brief.

Statement of the Case

Under "Summary Statement of the Matter Involved" (petition *ante*), a sufficient statement is made fully to understand this case, and is here adopted by reference.

Specification of Errors

1. The Circuit Court of Appeals erred in holding that a foreign corporation, by qualifying to do business and appointing a statutory agent in a particular state, did not thereby consent to be sued in such state upon a cause of action wherever arising notwithstanding that the corporation was not actually doing business in the state at the time the suit was commenced, provided it had not formally retired from the state nor revoked the appointment of its statutory agent.

2. The Circuit Court of Appeals erred in not holding that, until such statutory agency was formally revoked and the qualification of the foreign corporation affirmatively rescinded, such foreign corporation was there present and amenable to suit on causes arising without the state where the local law sanctioned such litigation.

THE ARGUMENT

Summary of the Argument

POINT A. The foreign corporation was suable in the District Court below.

POINT B. Certainly, such action is maintainable where sanctioned by the local law.

Point A

Succintly stated, as we view it, the case at bar is controlled by *Neirbo Co.* v. *Bethlehem Shipbuilding Corporation, Ltd.*, 308 U. S. 165.

In that case, suit was brought in the District Court for the Southern District of New York by residents of New Jersey against the Bethlehem Company, a Delaware corporation. The latter, conformably with local law, had upon qualifying in New York, designated its Secretary of State as agent for the service of process. The Bethlehem Company objected to the jurisdiction because neither it nor the plaintiffs resided in that District. It relied upon the strict language of Section 51 of the Judicial Code that where the jurisdiction was founded solely on the fact that the action was between citizens of different states, suit must be brought "only in the district of the residence of either the plaintiff or the defendant".

This Court, through Mr. Justice Frankfurter (the Chief Justice, and Justices Roberts and McReynolds dissenting) ruled that the Bethlehem Company was suable in these circumstances; *i. e.*, in a District where neither it nor the plaintiffs resided.

The rationale of the decision boils down to simply this—by qualifying in the State of New York and appointing a statutory agent there, the Bethlehem Company—a foreign corporation—entered into a contract with the State of New York which, until revoked, made it suable there by any plaintiff wherever residing.

In speaking of the effect of the designation of a statutory agent, the Court declared:

> "The scope and meaning of such a designation as part of the bargain by which Bethlehem enjoys the business freedom of the State of New York, have been authoritatively determined by the Court of Appeals,

speaking through Judge Cardozo: 'The stipulation is therefore a true contract. The person designated is a true agent. The consent that he shall represent the corporation is a real consent. He is made the person upon whom process against the corporation may be served. The contract deals with jurisdiction of the person. It does not enlarge or diminish jurisdiction of the subject matter. It means that whenever jurisdiction of the subject matter is present, service on the agent shall give jurisdiction of the person' ".

The Court observed that:

"All the parties may be non-residents of the District where the suit is brought,"—citing *Lee v. C. & O. R. Co.*, 260 U. S. 653, 67 L. Ed. 443, 43 S. Ct. 230. It was also said:

"Section 51 merely accords to the defendant a personal privilege respecting the venue, or place of suit, which he may assert, or may waive, at his election".

Mr. Justice Frankfurter (writing for the Court's majority) further declared that being a privilege, it might be lost in several ways; by the failure seasonably to assert it or by formal submission in a cause, or by conduct. And he said that the Bethlehem Company's qualifying in the State of New York and its appointment there of a statutory agent was such conduct as amounted to a waiver of that privilege. Interestingly he commented:

"Whether such surrendering of the personal immunity be conceived negatively as a waiver or positively as a consent to be sued, is merely an expression of literary preference."

We do not assert that the facts in the *Neirbo* case and the facts in the case at bar are identical. They are not. There the cause of action arose in the state where suit was commenced and where the defendant was carrying on business at the time.

But we do contend that the rule of that case is sufficiently broad to reach the case at bar and require the Alabama District Court to hear it. If it does not, we frankly concede the Court below was right.

What were the statutory requirements in respect to a foreign corporation qualifying in Alabama when the Gas Company entered that state on December 16, 1937, and appointed an agent in a county in the judicial District where this suit was begun?

Section 7209 of the Code of Alabama of 1923 was as follows:

> "Foreign corporation must file instrument of writing designating agent and place of business in this state.—Every corporation not organized under the laws of this state shall, before engaging in or transacting any business in this state, file with the secretary of state a certified copy of its articles of incorporation or association and file an instrument of writing, under the seal of the corporation and signed officially by the president and secretary thereof, designating at least one known place of business in this state and an authorized agent or agents residing thereat; and when any such corporation shall amend its articles of incorporation or association, or shall abandon or change its place of business as designated in such instrument, or shall substitute another agent or agents for the agent or agents designated in such instrument of writing, such corporation shall file a new instrument of writing as herein provided, before transacting any further business in this state".

This section has been carried forward unchanged and now appears as Section 192 of Title 10 of the Code of Alabama, 1940.

Supplementary of the statute under whose mandate the Gas Company had appointed a statutory agent was another statute to provide for the contingency of his death, removal,

etc., no successor being named. It was Section 9426 of the Code of Alabama, 1923. It provided as follows:

> "Service on designated agent of foreign corporations; proof of agency.—When a foreign corporation has filed an instrument in writing designating one or more agents in this state as provided by this Code, process issuing against such foreign corporation may be served upon any agent so designated; and the certificate of the secretary of state; or of the auditor, as the case may be, showing such designation, is evidence of the fact of such agency. If the agent designated by such foreign corporation shall die, resign, remove from the state, or his authority shall cease from any cause, and no other agent shall be designated by such foreign corporation, the service of process issuing against it may be made upon the secretary of state; and the officer serving such process upon the secretary of state must immediately transmit a copy thereof by mail to such corporation at its home office, and state such fact in his return."

As thus quoted the statute was in effect at the time of the Gas Company's formal entry into Alabama. Its compact with the State of Alabama was therefore made with respect to it and thus provided that service of all lawful process could be had upon the agent Beatty, who has been designated for that purpose, but if he died, or resigned, or removed from the state, or his authority ceased for any cause, and a successor be not appointed, then the Secretary of State could be served in his stead.

It is true that this last quoted statute was amended and enlarged by the Act of July 6, 1940 (General Acts of Alabama 1939, p. 976, approved July 6, 1940, set out in extenso in the Appendix). But at that time, according to the affidavit of the President of the Gas Company (R. 24), the latter had already disposed of all of its assets in Alabama and no longer carried on business there, thus fixing the

company's status with respect to this suit as ordained by the several acts in force at the time of its alleged withdrawal. Furthermore, the amendments in no sense forbade this suit. They merely provided that a foreign corporation's attempted withdrawal could not be effective "until the statutes of limitation shall have run against the bringing of action against said corporation" which, it is submitted, could not and did not have the effect ascribed to them by the opinion of the Court below of referring only "to causes of action which arose while the corporation was doing business in Alabama" but, on the contrary, speak with respect to the *duration of authority* rather than the scope and intent thereof. Compare *Aetna Casualty, etc., Co.* v. *Gentry*, 132 Pac. (2d) 326 (Oklahoma, 1942).

With this statutory background in mind, let us further discuss the case at bar in the light of the *Neirbo* decision whose profound effect has been reflected in a veritable deluge of articles in the professional publications of the country. That appearing in 49 Yale Law Journal 724 is typical. Its author commences by saying:

> "The gradual extension of the jurisdiction of the federal courts over foreign corporations has been a process of adjusting out-moded juristic stereotypes to the pragmatic need of exposing the business units to suit."

He continued:

> "Mr. Justice Frankfurter while accepting the doctrine that a corporation is a resident only of the state of its incorporation, held for the majority that Bethlehem had waived its venue privilege and consented to be sued in the Southern District of New York by its appointment of the statutory agent to receive process. * * *
>
> "This decision effectively overrules the holding of the Supreme Court in So. Pacific Co. *v.* Denton (146 U. S. 202), which had been followed almost uniformly

by the lower federal courts. At the same time it revives the old Schollenberger case as a precedent for venue actions under the present statute but reinterprets the rationale of that case to be that appointment of a statutory agent constitutes a *Consent to be Sued* (italics the author's) not merely a *Consent to be Found* (italics the author's)."

More aptly, perhaps, for our present purposes, the author of the note in 53 Harvard Law Review 660, speaking of the Effect of the case (with which we are here more concerned than with any close factual similarity in the two cases), observed (p. 665):

> "Effect:—This decision terminates the effective applicability of the amendment of 1887 to most cases involving foreign corporations. Though the obvious purpose of that amendment was to impose a limitation on proper forum, in addition to the requirement of jurisdiction, the *Neirbo* case *makes venue and jurisdiction coterminous* for the defendant foreign corporation at least where, as is usual, the latter has abided by state law and actually appointed an agent. Whatever difficulties may exist as to the theoretical basis of the *Neirbo* decision, there seems little doubt of its practical utility in removing most of the vestiges of corporate immunity to suit where business is done, and wiping out advantages enjoyed by the foreign corporation as compared with the domestic corporation". (Emphasis Supplied.)

In 20 Boston University Law Review, p. 137, the author, in discussing the effect of such consent derived from qualifying in a state, says (p. 142):

> "When divers citizenship exists, the venue of the action may be waived. States cannot by their legislation confer jurisdiction upon the courts of the United States, neither can consent of the parties give jurisdiction when facts do not but both state legislature and

consent of the parties may bring about a state of facts which will authorize the courts of the United States to take cognizance of a case, *and this is actually accomplished when a corporation consents to be sued* within a state as a condition precedent for doing business within that state. The important consideration *is the assent of the corporation,* and not whether it is actually 'found' or becomes an 'inhabitant' of the state. As the place where the party may be sued may be waived, it is not necessary to decide that the corporation is an inhabitant of the state in which suit is brought but the question is: Has it consented to be sued there and so waived any personal exemption in its favor?'' (Emphasis Supplied.)

And in 25 Washington University Law Quarterly, p. 287 at 289, it is said:

''It (the Neirbo case) does not affect the principle that a corporation is an inhabitant only of its state of incorporation nor the rule that venue is a privilege under the Act. For jurisdictional purposes service must be upon an agent sufficiently representative to receive service of process. But if the actual appointment of an agent, although under direction of a state statute, may be said to constitute a 'real consent' in relation to jurisdiction, so the majority of the Court held that that appointment may operate as consent in advance to waive the venue provision also. In reaching this result the majority interpreted as dictum that portion of the *Denton* case which said that compliance with the statute was not consent to waive the venue privilege. The majority also distinguished *In re Keasby & Mattison Co.,* cited by the dissent, upon the ground that there the designation of an agent as required by the state statute 'which is the basis of consent had in fact not been made' ''.

These articles are cited and quoted to demonstrate the correctness of our contention that the *Neirbo* decision had a much broader reach than was ascribed to it by the Court

below. The Court below, for instance, in the case at bar, makes a distinction between venue and jurisdiction where, as we have already seen, no such distinction fairly exists. It said that the problem here transcended "venue" and was "jurisdictional". These two, if agreement is had with the author of the article in the Harvard Law Review, are "coterminous". The Court below also declared:

> "*In the absence of consent,* the power to render judgment depends upon the presence or activities of the defendant within the territorial jurisdiction of the court rendering the judgment."[1] (Italics Supplied.)

We have no war to make upon that assertion. We think it is right. But we say its first phrase "In the absence of consent" does not apply because here the foreign corporation had, under the rule of the *Neirbo* case, actually consented to be sued.

Point B

It is important to bear in mind that long prior to these events from which originated the case at bar, the local law had sanctioned suits between non-residents on transitory causes of action arising outside of Alabama.

The Act of 1907 now appearing as Section 97, Title 7 of the Code of Alabama of 1940, is as follows:

> "Enforcement in this state of cause of action arising in another state, when jurisdiction of the defendant can be obtained in this state.—Whenever, either by common law or the statutes of another state, a cause of action, either upon contract, or in tort, has arisen in such other state against any person or corporation, such cause of action shall be enforcible in the courts

[1] The citation to this statement, of *International Shoe Co.* v. *Washington,* 326 U. S. 310, further demonstrates the misapprehension by the Court below of the *Neirbo* case. In the *State of Washington* case the foreign corporation had never qualified. Thus, there was no consent. Here the converse is true.

> of this state, in any county in which jurisdiction of the defendant can be legally obtained in the same manner in which jurisdiction could have been obtained if the cause of action had arisen in this state."

This statutory enactment brought an abrupt and complete change in the jurisprudence of the State. By it, any non-resident might sue on any transitory cause of action wherever arising, provided service could be had upon the defendant.[2]

The Act of 1907 was first construed in *National Council, etc.*, v. *Hill*, 208 Ala. 63, 93 So. 812 (1922). In that case, a Mrs. Hill, wife of one R. C. Hill, deceased, who during his lifetime had resided with her in Tennessee, sued on a certificate of life insurance there issued by appellant society, incorporated in Pennsylvania. The society, duly qualified to do business in Alabama, appeared specially, averring its non-residence and the accrual of the cause of action in Tennessee. Demurrers to the plea were sustained. The Supreme Court of the state, in affirming the judgment, after pointing out that service was duly had "upon the Insurance Commissioner" (the designated agent of the defendant), observed:

> "Therefore, the rule as declared in Pullman Palace Company *v.* Harrison, 122 Ala. 149, 25 So. 155, 72 Am. St. Rep. 68, and the Carr case, 76 Ala. 388, 52 Am. Rep. 339, there cited (i. e., in these cases the court held that a foreign corporation was not amenable to suit on a

[2] The Courts of Alabama have apparently at all times taken jurisdiction of suits between natural persons on transitory causes of action arising in another state even if both of the parties were non-residents of Alabama. (See *Steen* v. *Swadley*, 126 Ala. 616 at 621 (1899); *Lee* v. *Baird*, 139 Ala. 526 (1903); compare *Smith* v. *Gibson*, 83 Ala. 284). But prior to the act of 1907, it had been consistently held under the rule established by *Central Railroad and Banking Co.* v. *Carr*, 76 Ala. 388 (1884) that no Alabama Court had jurisdiction of any suit against a foreign corporation unless the cause of action had arisen within the state.

cause of action arising in a foreign jurisdiction) has been changed, and the trial court did not err in sustaining the demurrer to plea two or in declining to quash the service of process."[3]

It is therefore fair to say that when the Gas Company qualified to do business in Alabama and designated an agent for service of process there (including by force of the statute the Secretary of State where the named agent died, removed, etc.) it did so in the light of the local jurisprudence that it was thereby subjecting itself to suits wherever arising provided service could be duly had in accordance with its agreement with Alabama.

The only possible answer to this argument (assuming always that our construction of the *Neirbo* case is sound and the rule of its decision reaches the case at bar as we have above urged) is the curious decision of *Jefferson Island Salt Company* v. *Longyear Company*, 210 Ala. 352,

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[3] Compare *McKnett* v. *St. Louis and San Francisco R. R. Co.*, 292 U. S. 230, 54 S. Ct. 690, 78 L. Ed. 1227 where this Court reversed the Supreme Court of Alabama for attempting to abdicate its judicial function and decline in the face of the quoted statute, to entertain a cause of action of a Tennessee citizen under the Federal Employers Liability Act arising in Tennessee against the Illinois Railroad doing business in Alabama (227 Ala. 349, 149 So. 822). Mr. Justice Brandeis, after observing that the local law of Alabama having been declared, both by statute and judicially, to be appropriate to the occasion in ordinary litigation of trying foreign causes between non-residents, the Courts of Alabama would not be permitted to cast out such a suit because of its derivation under a Federal statute. Perhaps the Supreme Court of Alabama in the *McKnett* case was giving expression to an understandable inclination to lighten its labors by judicially emasculating the Act of 1907.

Our case is entirely dissimilar in this respect from the recent decision of the Circuit Court of Appeals in *Dunn* v. *Cedar Rapids Co.*, 152 F. (2d) 733 (C. C. A. 10, 1946). There a cause of action arising in Iowa was sued on in the Federal Courts in California, the defendant being an Iowa corporation domesticated in California. The Circuit Court of Appeals ruled that the defendant was not suable over its protest in that the local law—the law of California—did not permit its Courts to try such litigation. Here the converse is true.

98 So. 119 (1923) which, because it was referred to in the opinion of the Court below (and so largely relied on by counsel for the Gas Company), we feel constrained to analyze rather fully. That case involved a suit between two foreign corporations upon a cause of action arising outside Alabama. The defendant urged that it was not doing business in the state at the time that the suit was commenced, and that to subject it to the action would deny it due process.

As appears from the agreed statement of facts, the defendant, Longyear Company, had, in fact, qualified in Alabama and designated a statutory agent. At the time of the suit's commencement, it was not there doing business although it had not revoked the appointment of its statutory agent, and although after the suit had been commenced it resumed operations in Alabama. It was ruled that in these circumstances the strictures of due process rendered the Longyear Company not amenable to the suit.

If in view of the *Neirbo* case, *Jefferson Island Salt Company* v. *Longyear Company, supra,* is regarded as of any controlling moment—an impossible notion, it seems to us—there are at least two answers which may be made to it.

In the first place, to support his conclusion that due process necessitated a dismissal of the action, Chief Justice Anderson (who wrote the *Longyear* case) cited three decisions of this Court, as follows:

Simon v. *Southern Railroad Co.,* 236 U. S. 115, 35 S. C. 255, 59 L. Ed. 492;

Old Wayne Life Association v. *McDonough,* 204 U. S. 8, 27 U. S. C. 236, 51 L. Ed. 345;

New York Railroad Co. v. *Estill,* 147 U. S. 591, 13 S. C. 444, 37 L. Ed. 292.

Judge Anderson wrote that these three cases prevented the *implied* (sic) consent of a foreign corporation duly qualified in Alabama, to service of process when it was not actually doing business there at the time service was accomplished as to causes of action not arising in the State; that although since 1907 transitory causes of action were enforceable in Alabama in any county in which jurisdiction of the defendant could be obtained, and Alabama had thus opened its doors to foreign causes of action between nonresidents, that the *implied* (sic) consent must be so construed as to harmonize with the applicable decisions of this Court, which he asserted, in the three cited cases, forbade the entertainment of an action arising in another state.

Contrary to Judge Anderson's notion, the consent of the Longyear Company, as is made so clear by Mr. Justice Frankfurter in the *Neirbo* case, was not an implied consent at all. *It was an actual consent. It was a consent in fact.* It was a contract, and Judge Anderson in citing the United States Supreme Court cases (none of which dealt at all with any such situation) was guilty of a serious judicial error.

In *Simon* v. *Southern Railroad Company* (the first case cited by Judge Anderson in the *Longyear* case) the Southern Railroad, a Virginia corporation, sought an injunction in the Federal Courts to restrain Simon, a citizen of Louisiana, from enforcing a judgment obtained by him against the railroad under the following circumstances: Simon was hurt in Alabama while riding as a passenger on the railroad. He sued the railroad in the State Court of Louisiana, and attempted to obtain service on the defendant by service on the Secretary of State. There was in force at that time in Louisiana, a statute requiring foreign corporations doing business there, to designate a statutory agent upon whom service of process could be had and further providing that failing so to do, service could be had on the Secretary of

State. Simon got service on the Assistant Secretary of State. The latter made no effort to transmit the process to the railroad and unwittingly it suffered a judgment by default. *Most important the railroad had never in fact qualified in Louisiana and had never consented to be sued there and had never designated a statutory agent in that jurisdiction* (except so far as there could be an *implied* consent from the Louisiana statute above referred to). This Court perpetually restrained Simon from attempting to collect the judgment of the State Court, asserting that such *implied* consent as might be wrung from the Louisiana statute was limited to causes of action arising in that State.

Old Wayne Life Ins. Assoc. v. *McDonough*, also cited by Judge Anderson, presents precisely the same situation. There suit was brought in an Indiana State Court on a judgment obtained against the insurance company in a State Court of Pennsylvania. The insurance company, an Indiana corporation, was sued in a Pennsylvania State Court on a policy of insurance issued by it in Indiana. A Pennsylvania statute then in force, as a condition to their doing business in that Commonwealth, required foreign insurance companies to file a written stipulation agreeing that any legal process affecting it and served on the insurance commissioner, should have the same effect as if served personally on the company within the state. It was alleged in the complaint that the company was doing business in Pennsylvania and service was made on the insurance commissioner. The latter did not notify the insurance company, who filed no appearance in the case and a judgment by default was taken against it. It was undisputed that the insurance company had in fact never filed any such stipulation as required by the Pennsylvania statute. Such consent as it may therefore have given to be sued in Pennsylvania was an *implied* consent and as in the *Simon* case, the Supreme Court of the United States determined that such implied

consent (as distinguished from the actual consent found here and in the *Neirbo* case) was limited to causes of action arising in the state of the forum.[4]

There is all the difference in the world between the situation presented in the *Simon* and *McDonough* cases cited by Judge Anderson in the *Longyear* case and the situation there and here presented. The *Simon* and *McDonough* cases were not in any sense authorities for the proposition for which they were cited by him.

We are pleased that we are able to sustain our appraisal of the entire inappositeness of these decisions by a judicial pronouncement of the first rank. We refer to the decision of Judge Learned Hand in *Smolik* v. *Philadelphia and Reading Coal and Iron Company*, 222 F. 148 (D. C., S. D., N. Y., 1915).

In the *Smolik* case the defendant objected to being sued in the District Court of New York because it was a Pennsylvania mining corporation doing busness but having no part of its mines in New York, and was therefore not suable, as it contended, upon a cause of action arising from personal injuries suffered by the plaintiff in Pennsylvania while an employee of the defendant in its mines there situated. The coal company had qualified in New York and had appointed an agent there upon whom all process might be served. Judge Hand discussed the *Simon* and *McDonough* cases cited and relied on by Judge Anderson in the *Longyear* case. He said:

> "The ground of the decision was that the implied consent of the corporation arising from its doing business within Louisiana must limit it to actions arising out of business done within the state * * *".

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[4] The third United States Supreme Court case cited by Judge Anderson, *New York Railroad Co.* v. *Estill*, had nothing whatsoever to do with our problems and we are at a complete loss to understand how it could have been cited by him in the *Longyear* case.

"In Simon *v.* Southern Railroad supra, the court especially reserved from the decision a case, such as those at bar, where a foreign corporation has complied with the state statute and appointed an agent upon whom process may be served * * *".

"The limits of that consent are as independent of any actual intent as the consent itself. Being a mere creature of justice it will have such consent only as justice requires; hence it may be limited, as it has been limited in Simon *v.* Southern Railway, supra, and Old Wayne Insurance Co. *v.* McDonough, supra. The actual consent in the cases at bar has no such latitudinarian possibilities; it must be measured by the proper meaning to be attributed to the words used, and, where that meaning calls for wide application, such must be given. There is no reason that I can see for imposing any limitation upon the effect of Section 1780 of the New York Code, and as a result I find that the consents covered such actions as these."[5]

Additionally, the *Longyear* case has been severely trenched upon by *Parker* v. *Central of Georgia R. Co.*, 233 Ala. 149, 17 So. 333 (1936), a more recent decision of the Supreme Court of Alabama.

Mrs. Parker sued the railroad—a Georgia corporation—for the death of her husband killed while employed as a trainman near Talladega, Alabama. Suit was brought in the Circuit Court of Montgomery County, Alabama. Service of process was had upon the railroad's statutory agent,

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[5] In Cyclopedia of Federal Procedure, Vol. 4, p. 225, the distinction adverted to by Judge Hand appears as follows:

"There is of course no factual warrant for applying the Neirbo principle to situations where the corporation in question has not in fact or actual legal contemplation appointed an agent for service but is being pursued under the theory of 'implied consent' based on alleged doing business within the district."

duly designated at the time it qualified in the state whose authority had never been formally revoked.[6]

In the agreed statement of facts it was conceded that the defendant railroad was a foreign corporation duly qualified in Alabama and with a duly designated statutory agent on whom the service of process had been had. It was likewise shown in said agreed statement of facts that after the plaintiff's intestate had been killed, the defendant railroad passed into a Federal receivership; that the railroad had not been doing business in Alabama since said event and that it was not doing business at the time of the commencement of the suit. The railroad, relying on the *Longyear* case, pleaded in abatement that, since it was not engaged in business at the time of the suit's commencement, service on its statutory agent was insufficient to subject it to the jurisdiction of the court.

Realistically, the Court declined to follow the *Longyear* case, and while not explicitly overruling it, tacitly did so.

So we think it may be fairly asserted that the jurisprudence of Alabama permits suits of this nature to be brought in her Courts. This was true when the Gas Company entered the state and gave its *actual,* not its implied consent to be sued there. This actual consent, given in the framework of the existing local law, was not subject, in the phrase of Judge Hand, to any such "latitudinarian possibilities" as was ascribed to it in the opinion of the Court below.

Had this actual consent of the Gas Company ever been really withdrawn? The Court below thought it had. It said that ceasing to do business in the state amounted to such a withdrawal (as any other view might raise dangerous constitutional questions). Our answer to any such

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[6] In this respect like the case at bar and unlike *Cowikee Mills* v. *Alabama-Georgia Power Co.*, 216 Ala. 221, 113 So. 4, where at the time service of process was attempted on the Secretary of State there had been a formal renunciation by the defendant of its contract with the state and a formal withdrawal by it from Alabama.

theory is that it is not in accord with the rule either of the *Neirbo* case (as to the constitutional question) or as to the local law, which it is submitted, contrary to the statement of the Court below, requires more, if such actual consent is to be revoked, than a silent withdrawal from the state. Compare *Cowikee Mills* v. *Alabama-Georgia Power Co.*, 216 Ala. 221, 113 So. 4. Even in the *Longyear* case where the true nature and extent of such a consent was wholly misconceived by the Alabama Supreme Court because of its failure to understand and grasp the limitations of the rule of the *Simon* and *McDonough* cases, in speaking of such consent and the manner of its revocation, it was declared that the act of qualifying continued in force and effect until the corporation "*filed a new declaration of abandonment or change* as required *by the above* quoted provision." (Meaning the statute now appearing as Section 192 of Title 10 of the Code of Alabama of 1940) (emphasis ours).

The Conclusion

As we view this case, the injection of any vague constitutional questions into it is wholly unnecessary. We have here a Florida corporation which had qualified to do business in Alabama in 1937 and appointed a statutory agent for service of process, and thereafter in 1940, without formally terminating any of these relationships, ceased operating in Alabama. Does such a course of conduct constitute a consent to be sued in the Courts of Alabama by a non-resident on a cause of action arising outside the state? If this question is answered affirmatively this suit was maintainable in the District Court below. If these circumstances, on the contrary, fail to measure up to what this Court regards as a consent, then the decision of the Circuit Court below was right. We fail to see the bug-a-boo of any constitutional problem.

The constitutional questions which conceivably might arise in cases of this general character would stem from the Fourteenth Amendment. If a scheme were developed or a practice pursued whereby the non-resident corporation was never given an opportunity to defend itself, under familiar principles, there would be a violation of due process. *Pennoyer* v. *Neff*, 95 U. S. 714. For in such circumstances in the phrase of the Court our "traditional notions of fair play and substantial justice" would be offended. But here no such problem is involved. Adequate machinery was provided to insure that the defendant Gas Company had due and proper notice of the institution of this suit against it, and, as the Record shows, such safeguards were carefully preserved.

The reason for our determination to maintain this suit, if at all possible, is apparent. We seek here a forum in which both the Gas Company and the other respondents can be brought before the same bar of justice and there, together, made to defend themselves from the consequences of this tragedy. Unless such a common forum can be found, a serious miscarriage may well occur, for, if the Gas Company be sued alone in the Courts of Florida, it may well slough off the blame for this affair upon the manufacturer of the tank who conversely, if sued alone in Alabama, may charge the Gas Company with the responsibility for this young woman's death.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

Respectfully submitted,

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Birmingham, Alabama,
Attorney for Petitioner.

APPENDIX

Section 192 of Title 7 of the Code of Alabama of 1940 (1943 Supplement) Service on designated agent of foreign corporations; proof of agency.—When a foreign corporation has filed an instrument in writing designating one or more agents in this state as provided by this code, process, pleadings or papers issuing against such foreign corporation, other than in equity, may be served upon any agent, so designated; and the certificate of the secretary of state or of the auditor, as the case may be, showing such designation, is evidence of the fact of such agency. In the event such foreign corporation withdraws from this state and ceases to transact business herein, it shall continue to keep and maintain such agent within this state upon whom service of process, pleadings or papers may be made, until the statutes of limitations shall have run against the bringing of action against said corporation. If the agent designated by such foreign corporation shall die, resign, remove from the state, or his authority shall cease from any cause, and no other agent shall be designated by such foreign corporation, or said corporation shall revoke or fail to maintain in effect the authority of its designated agent after its withdrawal from this state and prior to the time when the statutes of limitations would have run against the causes of action so accruing against it, then in that event such corporation shall by a duly executed instrument filed in the office of the secretary of state, constitute and appoint the secretary of state its true and lawful attorney, upon whom all such process, pleadings or papers may be served, and therein shall agree that all such process, pleadings or papers which may be served upon its said attorney, shall be of the same force and validity as if served upon the said corporation, and the authority thereof shall continue in force irrevocably until the statutes of limitations shall have run against the bringing of the action against said corporation, and the same shall be held as due and sufficient service upon such corporation. In the event such corporation shall fail to so constitute and appoint the secretary of state its true and lawful attorney, upon whom all such process,

pleadings or papers may be served, and no other such agent shall have been so designated by such corporation for such purpose, then such corporation shall be deemed to have consented to the secretary of state being its true and lawful attorney, upon whom all such process, pleadings or papers may be served, until the statutes of limitations shall have run against the bringing of the action against said corporation, and the same shall be held as due and sufficient service upon such corporation. The secretary of state must immediately transmit by registered mail, return receipt requested, to such foreign corporation at its home office, a copy of such process, pleadings or papers served upon him, retaining the copy of such process, pleadings or papers served upon him along with the return receipt as part of the permanent records of his office. (1939, p. 976, Sec. 1, appvd. July 6, 1940.)

(9003)